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Supreme Court of the United States,

OCTOBER TERM, 1930.

NO. 53.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

WILLINGHAM LOAN AND TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

J. C. MURPHY,
JOSEPH M. HARTFIELD,
Counsel for Respondent.

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*Footnote

IN THE

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No. 53.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

AGAINST

WILLINGHAM LOAN AND TRUST COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 6-9) is reported in 15 B. T. A. 931. The opinion of the Circuit Court of Appeals (R. 13-14) is reported in 36 Fed. (2) 49.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 22, 1929 (R. 15). Petition for certiorari was filed February 21, 1930, and certiorari was granted on April 14, 1930 (R. 16). (281 U. S. 710.) The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The question presented is whether or not the days on which Federal income tax returns for 1920 and 1921 were filed are to be counted in the computation of the time within which assessments of deficiencies in tax for those years may be made. The Board of Tax Appeals excluded and the Circuit Court below included the days. Specifically, the question is: Where the returns for 1920 and 1921 were filed on March 15, 1921 and March 15, 1922, respectively, were assessments of deficiencies for those years made on March 15, 1926, late? This requires a construction of Section 277 (a) * * (2) and (3) of the Revenue Act of 1926.

Statutes Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58:

> Sec. 277(a) Except as provided in section 278—
>
> (1) The amount of income taxes imposed by this Act shall be assessed within three years after the re-

turn was filed and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits and war-profits taxes imposed by the Revenue Act of 1921 and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Revenue Act of 1928, c. 852, 45 Stat. 791, 856:

Sec. 275. *Period of Limitation upon Assessment and Collection.*

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be assessed within two years

after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Summary of Argument.

I. The language used in the statute requires the inclusion of the days on which the returns were filed in computing the limitation periods, for the reasons: (*a*) A literal construction of the word "within" means "in the limits of" or "on the inside of" the five (four) year period. (*b*) The purpose in adopting and the history of these limitation provisions indicate that Congress did not intend that they should be construed liberally in favor of the Commissioner. (*c*) To exclude the days on which the returns were filed in making the computations would exclude time which might have been utilized for the assessment of the deficiencies. (*d*) To exclude the days on which the returns were filed would be in conflict with the statement of this Court in *Florsheim Brothers Drygoods Company* v. *United States*, 280 U. S. 453, 460, that "the period of limitation should *begin on the date* when the return was filed" (italics ours).

II. If it is thought that there is any doubt in the meaning of the language, that doubt should be resolved in favor of the taxpayer and against the Commissioner, as uniformly held by this Court.

III. It is submitted that the various cases cited in Petitioner's brief as being in conflict with the decision below are unimportant for one or more of the reasons: (*a*)

None of them construe the limitation provisions here involved. (*b*) They are decisions calculated to reach an equitable result, whereas an equitable construction is not admissible in a taxing statute. (*c*) They are based on a literal construction of the language used. (*d*) They do not establish a general rule, binding on this Court, which can prevent the literal interpretation of the present statute or which can affect the application of the rule of resolving doubt in favor of the taxpayer.

Argument.

I.

It is well settled that unambiguous terms in a statute must be construed literally, unless such literal construction shocks the general moral or common sense.

The Supreme Court has recognized the applicability of this rule to the determination of these time cases. In *Dutcher* v. *Wright*, 94 U. S. 553, 561, it said:

> "Due weight in every case should be given to the words of the phrase to be construed, and by so doing many of the reported cases otherwise seemingly inconsistent may be satisfactorily reconciled."

The rule applies particularly in the interpretation of taxing statutes. *Crooks, Collector* v. *Harrelson, et al.*, 51 Sup. Ct. 49. Mr. Justice Sutherland there said (p. 51):

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the

> letter applies with peculiar strictness. In *United States* v. *Merriam*, 263 U. S. 179, 187, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240, 29 A. L. R. 1547, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122, that 'if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' "

Section 277 (*a*) * * (2) and (3) requires the assessment of the tax "*within* five (four) years after the return was filed" (italics ours). The word "within" is thus defined in Webster's New International Dictionary:

> "In the inner or interior part of; inside of; not without; in the limits or compass of; not further in length than; inside the limits of; not going outside of; not beyond."

Therefore, if the statute is literally interpreted, any assessment which is made one moment after the expiration of five years from the moment the return was filed is not "within" five years after the filing of the return. It would seem that any workable rule must disregard fractions of days. Hence, the only possible rule which can be adopted,

under a literal interpretation of the statute, is to include the day the return was filed. To exclude that day would permit assessments not "within" five (four) years after the return was filed, contrary to the specifically expressed intention of Congress.

Prior to the Revenue Act of 1918, there was no limitation upon the time in which the Government could sue to recover taxes. A limited period for the assessment and collection of deficiencies was established in order that taxpayers might have repose. With the successive Revenue Acts the time was steadily decreased from five to two years.* Considering the purpose of these provisions and their history, it is respectfully submitted that an interpretation which would exclude the day of filing the return would be a liberal interpretation favorable to the Commissioner, and that it would be in direct conflict with the legislative intent. Where a literal interpretation would be in harmony with that intent, no good reason is perceived why it should be rejected. In *Griffith, et al.* v. *Bogert, et al.*, 18 How. 158, 163, a *terminus a quo* case, the Court said:

> "It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. * * * The intention and policy of the enactment should be sought for and carried out."

The days on which the returns were filed might have been used for the purpose of assessing the deficiencies as

* See Statutes, Petitioner's Brief, pp. 2, 3; Statutes, this Brief, pp. 2-4; Revenue Act of 1924, c. 234, Section 277, 43 Stat. 253, 299.

effectually as any other days during the limitation periods. Manifestly, an assessment of a deficiency made on the day a return is filed would be a valid assessment. Therefore, to eliminate that day in the computation of the limitation period would necessarily result in the enlargement of the time within which deficiencies might have been assessed, and would, by construction, extend the taxing period beyond the clear import of the language used in the statute. See *Crooks* v. *Harrelson, supra.* This Court has recognized the soundness of such reasoning in deciding these time cases. *Taylor* v. *Brown*, 147 U. S. 640, 646; *Griffith, et al.* v. *Bogert, et al., supra*, p. 163.

For these reasons, it is submitted that the decisions which Petitioner has sought to distinguish from the present case on the ground of "obvious intent" (see Petitioner's brief, pp. 7, 8) are more nearly in point than those decisions upon which Petitioner relies.

In *Florsheim Brothers Drygoods Company* v. *United States*, 280 U. S. 453, this Court considered whether or not a so-called tentative return would start the running of the statute of limitations on additional assessments, and, if not, whether or not certain assessments had been made in time, measuring the period on the basis of the final returns. Holding that the final returns started the statute running and that the assessments were in time, Mr. Justice Brandeis said (p. 460):

> "And, in providing that the period of limitation should *begin on the date* when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner." (Italics ours)

II.

It is well settled that doubtful language in taxing statutes, *including limitation sections embodied therein,* must be construed liberally in favor of the taxpayer. In *United States* v. *Updike*, 281 U. S. 489, 496, the Court said:

> "In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing statutes, including provisions of limitation embodied therein, to be construed liberally in favor of the taxpayer. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 349, 47 S. Ct. 389, 71 L. Ed. 676."

See also *Russell* v. *United States*, 278 U. S. 181.

Petitioner's brief does not mention that the court below based its decision largely upon this rule, and proceeds on the assumption that the Circuit Court decided the case solely on the distinction between measurement from a date and from an event. A reading of the opinion below shows that the court considered such a distinction, at most, only an *additional* reason for its conclusion. Reference to the distinction was made primarily, it is believed, to prevent the impression that the court had reversed its earlier decision in *New York Life Ins. Co.* v. *Bullock, et al.*, 26 Fed. (2) 666.

Therefore, if this Court should find there is doubt in the language used in the instant statute, it is submitted that the rule of resolving doubt in favor of the taxpayer requires the inclusion of the day of filing.

III.

Petitioner's brief (p. 6) states that the decision below is in conflict with the decisions of other courts "construing similar statutes". Respondent disputes this. It is submitted that the cases relied upon by Petitioner are either unimportant or distinguishable for one or more of the following reasons.

None of them involved the instant statute.

Only two, *Eliot National Bank* v. *Gill*, 218 Fed. 600 (C. C. A. 1), affg. 210 Fed. 933, and *Chambers* v. *Lucas*, 41 Fed. (2) 299 (Ct. App., D. C.), construed Federal taxing statutes. Those which did not deal with Federal taxing statutes could not be affected by the principle of interpretation in favor of the taxpayer. The opinions reveal that, the language construed being doubtful, the courts adopted that view which would prevent forfeitures, avoid hardship or preserve rights. As stated in *Crooks* v. *Harrelson, supra*, such considerations have no materiality whatever in the interpretation of Federal taxing statutes. The rule for resolving doubt in Federal taxing statutes is *construction in favor of the taxpayer*. For like reasons, it is submitted that the State court cases cited by Petitioner are unimportant.

Neither *Eliot National Bank* v. *Gill, supra*, nor *Chambers* v. *Lucas, supra*, were *decisions* supporting Petitioner. The statements of the courts that the *terminus a quo* should be excluded were not necessary to the conclusions reached.

Many of Petitioner's citations can be explained on the ground of literal construction. This Court has recognized

that literal construction is a sound basis for deciding these time cases. *Dutcher* v. *Wright, supra*, p. 561. The distinction drawn by many courts [*Arnold, et al.* v. *U. S.*, 9 Cranch 104, 120, 3 L. Ed. 671; *Zimmerman* v. *U. S.*, 277 Fed. 965 (C. C. A. 7); *N. Y. Life Ins. Co.* v. *Bullock*, 26 Fed. (2) 666, 667 (C. C. A. 5); *Board of Commissioners* v. *Vandriss*, 115 Fed. 866, 871 (C. C. A. 8); *Leeper* v. *Lemon G. Neely Co.*, 293 Fed. 967, 970 (C. C. A. 6)] between measurement from a date and from an event is recognition of the rule of literal construction. On the ground alone that they involved measurement from a date the following citations of Petitioner can be distinguished: *Sheets* v. *Selden's Lessee*, 2 Wall. 177; *Hicks* v. *National Life Ins. Co.*, 60 Fed. 690 (C. C. A. 2); *Supreme Council American Legion of Honor* v. *Gootee*, 89 Fed. 941 (C. C. A. 4); *Eliot National Bank* v. *Gill, supra*; *U. S.* v. *Senecal*, 36 Fed. (2) 388 (D. C., D. Mass.).

In *Dutcher* v. *Wright, supra*, *In re Hamilton*, 29 Fed. (2) 281 (C. C. A. 7), and *Bell* v. *West*, 44 Fed. (2) 161, the Federal Bankruptcy Act was involved. A section of that Act provides for the exclusion of the first and inclusion of the last day.

Petitioner's citations do not establish a general rule [*Taylor* v. *Brown, supra*; *Griffith, et al.* v. *Bogert, et al., supra*; *Owensboro* v. *Owensboro Water Works Co.*, 243 U. S. 166; *Arnold* v. *U. S., supra*; *Leidigh Carriage Co., et al.* v. *Stengel, et al.*, 95 Fed. 637 (C. C. A. 6); *Board of Commissioners* v. *Vandriss, supra*; *In re Puglisi*, 230 Fed. 188 (D. C., E. D. Pa.); *Dutcher* v. *Wright, supra*]. There is no reason, therefore, why this Court cannot literally

interpret the language of the instant statute or apply the rule of resolving doubt in favor of the taxpayer.

It would seem sufficient answer to Petitioner's "anomalous situation" argument (Petitioner's brief, pp. 8-9) that the applicable statute is Section *277(a)* * * (*2*) and (3) of the Revenue Act of *1926*, the wording of which does not permit the possibility of any such "anomalous situation" as he suggests. The Revenue Act of 1924 first adopted the phraseology which appears in the 1926 Act (and which was carried over into the 1928 Act). It may well be that Congress, aware of the very situation which Petitioner suggests, sought to remedy it.

Conclusion.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

J. C. MURPHY,
JOSEPH M. HARTFIELD,
Counsel for Respondent.

January, 1931.